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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-0003

LOYD MAYS, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Loyd Mays, appeals through counsel a November 13, 2015, Board of Veterans' Appeals (Board) decision that denied him entitlement to restoration of a 70% rating for service-connected bilateral hearing loss and affirmed the propriety of a disability rating reduction to 30%. Record (R.) at 2-25. The appellant argues that the Board failed to provide adequate reasons or bases for its November 13, 2015, decision. Appellant's Brief (Br.) at 4-12. For the following reasons, the Court will reverse that part of the Board's November 2015 decision pertaining to the propriety of the bilateral hearing loss reduction and remand both matters for VA to reinstate the appellant's 70% disability rating for bilateral hearing loss, effective April 9, 2009.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and specified relations of veterans, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined

pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); see *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Army from September 1964 to September 1966. R. at 711. In February 2005, the appellant filed a claim for benefits based on his bilateral hearing loss. R. at 783. In September 2005, the appellant was granted service connection for his bilateral hearing loss and awarded a noncompensable rating. R. at 649. In October 2005 the appellant filed a Notice of Disagreement (NOD). R. at 621-24. The appellant was given a VA audio examination in May 2007. R. at 548-50. For his right and left ear, the appellant's puretone air conduction examination results were as follows:

	1000hz	2000hz	3000hz	4000hz	Puretone Average
Left Ear	65	85	80	75	76
Right ear	55	65	55	55	58

R. at 549.

In a June 2007 decision, the regional office (RO) granted the appellant a 10% disability rating effective February 16, 2005, and a 30% disability rating effective May 29, 2007. R. at 544. In April 2009, the appellant submitted a request for an increased disability rating, stating that his hearing had worsened. R. at 495. Based on this request, VA provided a fee-based audio examination in May 2009. R. at 454-59. For his right and left ear, the appellant's puretone air conduction examination results were as follows:

	1000hz	2000hz	3000hz	4000hz	Puretone Average
Left Ear	85	95	100	110	97.5
Right ear	85	95	100	100	95

R. at 456. In June 2009, the RO issued a decision increasing the appellant's disability rating for his bilateral hearing loss to 70%. R. at 449-51.

In September 2009, the appellant underwent an audio examination in connection with his application for a total disability rating based on individual unemployability (TDIU). *See* R. at 142-44. For his right and left ear, the appellant's puretone air conduction examination results were as follows:

	1000hz	2000hz	3000hz	4000hz	Puretone Average
Left Ear	55	60	55	50	55
Right ear	60	85	80	75	75

R. at 374. In April 2010, the RO issued a decision denying the appellant's matter of TDIU and reducing his disability rating for bilateral hearing loss to 30%. R. at 337-44. In response, the appellant submitted a NOD in May 2010. The appellant was given another VA audio examination in June 2010. R. at 178-79. For his right and left ear, the appellant's puretone air conduction examination results were as follows:

	1000hz	2000hz	3000hz	4000hz	Puretone Average
Left Ear	60	65	60	55	60
Right ear	65	85	80	80	77.5

R. at 178-79.

The Board remanded the matter in June 2011, R. at 273-77, March 2013, R. at 236-242, and November 2013, R. at 201-04, and in a May 12, 2014, decision, denied the appellant's claim. R. at 86-96. The appellant timely filed an appeal with this Court and the Court granted the parties' joint motion for remand. R. at 77-82.

In November 2015, the Board denied the appellant's appeal for restoration of his 70% disability rating for bilateral hearing loss. R. at 88. In its decision, the Board stated that "no medical opinion is needed to clarify why the Veteran does not use hearing aids consistently." R. at 9. The Board then concluded that "The fact of lessened inconsistent wearing of hearing aids . . . suggests that the hearing had improved, rendering the hearing less dependent upon the use of hearing aids."

R. at 10. The Board then stated that its consideration of whether the appellant's hearing actually improved involved a mechanical application of the rating schedule. *See* R. at 13.

The Court concludes that the Board provided an inadequate statement of reasons or bases for not affording the appellant a medical examination to determine whether his hearing had actually improved. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (detailing that, in each of its decisions, the Board is required to provide a written statement of the reasons or bases for its findings and conclusions adequate to enable an appellant to understand the precise basis for the Board's decision as well as to facilitate review in this Court). Specifically, the Board's discussion of the appellant's inconsistent usage of hearing aids is not consistent with the law.

The relevant question for the Board to address was whether a medical examination was necessary to determine whether the appellant's hearing had actually improved. 38 U.S.C. § 5103(a)(2016) (stating that VA "shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit"). The Board decided not to provide the appellant an examination because the inconsistent use of the appellant's hearing aids indicated an improvement in hearing. *See* R. at 10. Yet, the Board's finding of material improvement was based upon a mechanical application of the rating schedule. *See* R. at 13; *see also Lendemann v. Principi*, 3 Vet.App. 345, 349 (1992). It is unclear how the appellant's use of hearing aids is relevant to the question of whether the appellant is entitled to a medical examination, particularly when the hearing tests provided by VA tests veterans without the use of hearing aids. 38 C.F.R. § 4.85(a)(2016). Because the Board affirmed a reduction in rating without following the applicable law, the reduction is void ab initio. *See Kitchens v. Brown*, 7 Vet.App. 320, 325 (1995) ("Where . . . the Court finds that the [Board] has reduced a veteran's rating without observing applicable laws and regulation, such a rating is void ab initio and the Court will set it aside as not in accordance with law."); *see also King v. Shinseki*, 26 Vet.App. 484, 492-93 (2014).

This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.").

Based on the foregoing reasons, the Court REVERSES the Board's November 13, 2015, decision pertaining to the propriety of the bilateral hearing loss reduction and REMANDS all matters for VA to reinstate the appellant's 70% disability rating for bilateral hearing loss, effective April 9, 2009.

DATED: November 30, 2016

Copies to:

Michael R. Viterna, Esq.

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